Supreme Court, U.S.
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NO. 92-206

IN THE

SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1991

D.L. and J.L., and D.L. as
Guardian ad Litem for
C.L. and A.L., Minors,

Petitioners,

v.

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Respondent.

Petition for Writ of Certiorari to
the Supreme Court of South Dakota

REPLY TO BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners take exception to respondent's statement that "The challenged decision of the South Dakota Supreme Court involved the interpretation of an exclusion in a liability insurance contract" (emphasis added). There was no issue before the Supreme Court of South Dakota regarding the meaning or construction of the language of the policy exclusion. Rather, the issue before the South Dakota Supreme Court was whether the policy's intentional injury exclusion applied under the facts of this case.

Petitioners also differ with respondent's statement that "This is not a case where a victim sustained an accidental physical injury . . ." The trial court entered a finding of fact that petitioners' injuries were not intended. Pet. App. 68. Therefore, the injuries were "accidental" in the sense that they were not intentional.

In the statement of facts contained in petitioners' Petition for Writ of Certiorari, which was accepted by respondent (see Brief of Respondent in Opposition to Petition for Writ of Certiorari, p. 1), the language of the pertinent policy exclusion and the applicable policy definitions are set forth. See Petition for Writ of Certiorari, p. 10-11. Briefly summarized, the policy excluded coverage for bodily injury which was expected or intended by an insured. "Insured" was defined as the person whose name appeared on the policy's declarations page as well as any insured's relatives that resided in the same household. Thus, as defined in the policy, the intentional injury exclusion would only apply if an insured (as opposed to any other person) intended or expected injury.

Precision as to the exact language of the exclusion on which American Family relies, as well as to the policy's definitions of terms used within the

exclusion, is crucial to understanding why respondent's arguments regarding the constitutionality of the Purdy decision are fundamentally flawed. Due to the policy's language and definitions, the insurance contract requires a subjective analysis of the insured's intentions or expectations rather than an objective analysis.[1]

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[1]Respondent argues that South Dakota has adopted and objective approach to determining whether an insured expects injury, citing Western Casualty & Surety Co. v. Waisanen, 653 F. Supp. 825 (D.S.D. 1987). The Waisanen court was quoting a legal principle from an opinion of the Eighth Circuit Court of Appeals, however, not law established in South Dakota.

While respondent claims Waisanen was "quoted with apparent approval" in Tri-State Ins. Co. of Minnesota v. Bollinger, 476 N.W.2d 697, 701 (S.D. 1991), it was quoted for the principle that the "accidental" quality of an injury is determined by looking at the result, not by looking at the act which caused the result. Id.

South Dakota has never adopted an objective test for determining whether an insured expects injury to occur. To do so would violate the policy language, and the court is bound to abide by the language of the policy. Rodriguez v. Williams, 729 P.2d 627, 630 (Wash. 1986). Under the policy language in the case at bar, coverage would be excluded only if an insured expected injury. Thus, the policy language mandates a subjective analysis.

At the declaratory judgment trial, American Family bore the burden of proving by a preponderance of the evidence that an "insured" had intended or expected to injure the Lerback children. Under the facts of this case, Bradley Purdy was the only person who met the policy's definition of "insured."

American Family failed to carry its burden, however. Dr. Michael McGrath, American Family's expert who testified at the trial of the declaratory judgment action, testified on cross-examination:

> Q Had there been sufficient data available, it very well could have supported Dr. McCall Perez's conclusions, couldn't they?
>
> **MR. DIEBERT:** Objection. Speculation and conjecture.
>
> **THE COURT:** Overruled.
>
> THE WITNESS: I would expand upon that answer. That would help, yes.

Q. It could very well support Dr. McCall-Perez's conclusions, couldn't they?

A. Or refute it.

Q. But you don't know?

A. I don't know.

* * *

Q. It is possible -- you say that it is possible that Mr. Purdy did not intend to harm those victims at the time these acts occurred?

A. That is possible.

Q. And it is possible that he did not expect any harm to come?

A. That is possible.

* * *

CROSS EXAMINATION BY MR. SCHLAUGER:

Q. Dr. McGrath, I might have just one quick question, if I can just clear this up.

What Mr. Knudsen was asking you, again, it is very possible that Brad Purdy did not intend to harm the victims, is it not?

A. Very possible.

* * *

RECROSS EXAMINATION BY MR. KNUDSEN:

Q. Well, I don't recall at the end whether your answer was to the expectation question it is possible that Brad did not expect harm to occur, and I believe your answer was yes?

A. At this point, I don't think we can know what his expectations or intentions were, but it is equally possible he did or he didn't.

Pet. App. 52-54.

Thus, the record before the trial court contained Purdy's own testimony proclaiming that he did not intend or expect to injure the Lerback children. Pet. App. 1-2. It also contained the opinion of Dr. McCall-Perez consistent with Purdy's testimony. Pet. App. 26-31, 43. And the record contained the testimony of American Family's own expert stating that

it was very possible that Purdy had not intended or expected to injure Christian or Andrew Lerback. Pet. App. 53-54.[2]

There was no direct evidence to the contrary. In other words, American Family presented the trial court with no direct proof that Purdy did intend or expect injury. Rather, American Family attempted to meet its burden of proof by presenting circumstantial evidence of intent or expectation. The trial court, however, was

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[2]For respondent to argue that such scientific evidence flies in the face of reason and common sense impeaches the credibility of American Family's own expert witness. Dr. McGrath, American Family's witness, testified that it was very possible Purdy did not intend or expect injury to the Lerback children. Pet. App. 53.

At one time it also flew in the face of reason and common sense to believe that the earth was round, that the earth revolved around the sun, or that man could fly. Enlightened people now embrace what was once deemed heresy.

"Wisdom too often never comes, and so one ought not to reject it merely because it comes late." Henslee v. Union Planters Nat'l Bank & Trust Co., 355 U.S. 595, 600, 69 S. Ct. 290, 293 (1949)(Frankfurter, J., dissenting).

not convinced that Purdy intended or expected injury. Pet. App. 59-60.

ARGUMENT

I. STANDING.

Respondent argues that petitioners lack standing to request review because petitioners allegedly cannot establish that a favorable decision by the Supreme Court of the United States would redress their injury. Respondent's objection based on standing is flawed, however, because petitioners were the object of the unconstitutional action and a favorable decision would cure the unconstitutional deprivation.

There is little question that a favorable decision will redress an injury when a party invoking federal court jurisdiction is an object of the allegedly unconstitutional action. Lujan v. Defenders of Wildlife, _____ U.S. _____, 112 S. Ct. 2130, 2137 (1992).

In this case, petitioners were the object of the unconstitutional action. The

opinion by the Supreme Court of South Dakota creates an irrebuttable presumption which deprives petitioners of property without due process of law under circumstances where reasonable alternative means exist to make the determination which is irrebuttably presumed. Decisions by the Supreme Court of the United States establish the aforementioned combination of factors unconstitutionally violates the due process clauses of the United States Constitution. Vlandis v. Kline, 412 U.S. 441 (1973); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972).

A reversal of the Purdy decision would redress petitioners' injuries by assuring that petitioners would enjoy the constitutionally guaranteed safeguards of due process, equal protection, and the constitutional proscription against impairment of contracts.

Because a favorable decision by the United States Supreme Court would redress

petitioners' injuries, petitioners have standing to invoke this court's jurisdiction.

II. ADEQUATE AND INDEPENDENT STATE LAW BASIS.

Respondent argues that this court should not review the Purdy decision because there allegedly exists an adequate and independent state law basis for the challenged decision. The sole basis for the Supreme Court of South Dakota's decision, however, is abundantly clear:

> Although the trial court's analysis is correct under our summary judgment cases, [citations omitted], we carve an exception to this general rule for criminal sexual contact cases and infer as a matter of law that harm was expected or intended . . . We hold these acts of criminal sexual contact are of such a nature that the intention or expectation to inflict bodily injury will be inferred as a matter of law. The exclusion for bodily injury either "expected or intended" in this policy applies to these facts. Since the exclusion applies, there is no coverage under the policy and American Family has no duty to defend Purdy in the underlying action. We reverse the trial court's denial of summary judgment.

Purdy, 483 N.W.2d at 201 (emphasis added). The court's language unequivocally

establishes that its decision was bottomed on the newly-created exception applied to criminal sexual contact cases. That exception established an unconstitutional irrebuttable presumption that in all cases of criminal sexual contact, the perpetrator intends or expects to injure the victim.

The court's opinion provides no other "adequate and independent ground under state law for the challenged decision." The sole ground for the decision was the irrebuttably presumed fact that Purdy intended or expected injury. Once that determination was reached by means of the presumption, the application of the intentional-injury exclusion was a mere formality. There could be no other conclusion -- coverage was excluded.

At this point, petitioners feel compelled to point out two grave misstatements contained in respondent's brief. First, at pages 19-20 of Brief of Respondent in Opposition to Petition for Writ of Certiorari, respondent states that

the South Dakota Supreme Court characterized the testimony by Dr. McCall-Perez (petitioners' expert witness who testified that Purdy did not intend or expect injury) as "fl[ying] in the face of all reason, common sense, and experience." Purdy, however, contained no such description of the Dr. McCall-Perez's expert testimony.

American Family cites to Purdy, 483 N.W.2d at 199 as the location within the opinion where this alleged criticism appears. The only place where those words appear on page 199 of the Purdy decision is where the court was quoting language from the case of CNA Ins. Co. v. McGinnis, 282 Ark. 90, 666 S.W.2d 689, 691 (1984). The South Dakota Supreme Court quoted the Arkansas Supreme Court's characterization of the perpetrator's (not an expert witness's) testimony.

The Supreme Court of South Dakota did not ridicule Dr. McCall-Perez's testimony in any way. Thus, for respondent to claim

that the South Dakota Supreme Court was referring to the testimony of Dr. McCall-Perez when quoting the aforementioned language has absolutely no basis in fact.

Second, respondent states that the testimony of Dr. McCall-Perez is directly contradicted by Purdy's own deposition testimony with respect to Purdy's intent to injure or expectation of injury. See Brief of Respondent in Opposition to Petition for Writ of Certiorari, p. 20. Once again, this a misstatement of the record.

Nowhere in Purdy's deposition does Purdy state that he intended to injure the Lerback children. Nowhere in Purdy's deposition does he testify that he expected that the children would be injured. In fact, Purdy's testimony is to the contrary. Purdy testified that he did not intend to injure the Lerback children. Pet. App. 1-2. Purdy testified that he did not expect the children would be injured. Id. Dr. McCall-Perez's opinion is perfectly

consistent with Purdy's testimony. Pet. App. 9-11, 25-46.

The remainder of respondent's brief goes to the merits of the issues that would be briefed once this court issues a writ of certiorari. Therefore, as it would be premature to argue those issues at this stage of the proceedings, petitioners will defer arguing the merits of the constitutional issues at this time. This deferral should not, however, be construed as any type of concession to respondent's arguments on the merits.

As established by the petition for writ of certiorari, a writ should be issued to review the Purdy decision because it is contrary to applicable decisions of the Supreme Court of the United States. Vlandis, 412 U.S. 441, 93 S. Ct. 2230 (1973); Stanley, 405 U.S. 645, 92 S. Ct. 1208 (1972); and LaFleur, 414 U.S. 632, 94 S. Ct. 791 (1974). Because Purdy and state and federal court decisions from no less than 25 jurisdictions contain

unconstitutional holdings inconsistent with United States Supreme Court precedent, this court should issue a writ of certiorari to review the Purdy decision and issue an opinion correcting the constitutional violations Purdy contains.

Alternatively and as further support for issuing a writ of certiorari, Purdy should be reviewed because it decides important questions of federal law involving due process, equal protection, and impairment of contracts, which have not been but should be settled by the Supreme Court of the United States. Because the same constitutional errors have been and continue to be made in both state and federal courts throughout the United States, review is necessary to ensure compliance with constitutional mandates.

CONCLUSION

Respondent's objection to issuance of a writ of certiorari based on alleged lack of standing is without merit because a favorable decision by this court will

redress petitioners' injuries. It will protect petitioners' constitutionally guaranteed rights of due process, equal protection, and will prohibit the Supreme Court of South Dakota from impairing the obligations of the insurance contract.

Respondent's objection based on alleged adequate and independent state-law basis for the decision is also without merit. The only basis for the Purdy decision was the creation of the unconstitutional irrebuttable presumption, and the application of that presumption of the facts. The sole basis for the decision was unconstitutional and requires reversal.

The ironic consequence of court opinions which presume an insured's intent to harm or expectation of injury in all cases of criminal sexual contact is that the innocent victim of the crime -- the blameless child -- is denied a source of compensation for the grievous injuries inflicted by the abuse.

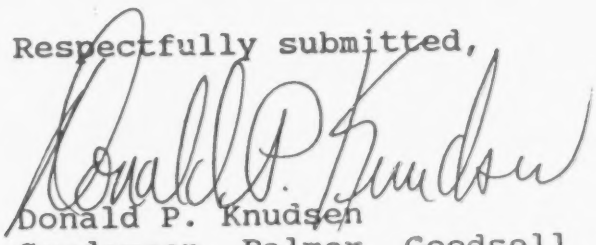
Without such compensation and without the treatment which compensation could make possible, there is a chance that the victim may go on to become an offender himself. Public policy is best served by rational decisions founded in fact rather than by the creation of an irrebuttable presumption which is not necessarily true and which operates to deprive much-needed compensation to innocent victims of sexual abuse.

Issuance of a writ of certiorari and reversal of the Purdy decision would cause courts to provide that which is constitutionally required -- a fair hearing on the issue of an insured's intentions and expectations -- before an insurance company could avoid its contractual obligations on the basis of an intentional-injury exclusion. Such a decision would be consistent with reason, common sense and logic: it would recognize that all humans do not think alike and that due to some mental disease or defect, some people may

commit a crime without intending or expecting injury.

For all of the reasons stated above, petitioners respectfully petition the Supreme Court of the United States to issue a writ of certiorari to the Supreme Court of South Dakota to review the Purdy decision.

Respectfully submitted,



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